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PP v. DHARMA RAJ BALLURAJAH & ANOR

HIGH COURT MALAYA, PULAU PINANG
COLLIN LAWRENCE SEQUERAH JC
[CRIMINAL TRIAL NO: 45-41-12-2012]
12 APRIL 2016

B

CRIMINAL LAW: *Penal Code – Section 302 – Murder – Defence – Mistaken identity – Allegation of – Whether accused persons properly and positively identified as perpetrators of crime – Whether conviction safe*

C ***EVIDENCE:*** *Identification parade – Conduct of – Identification of accused persons – Whether accused persons properly and positively identified – Whether identification made in ideal circumstances – Whether prima facie case established – Turnbull guidelines – Whether complied with – Whether conviction safe*

On 26 January 2012 at about 7.30pm, SP10, SP14 and SP15 went to a D restaurant for a meal. The deceased was the boyfriend of SP14. After sometime, they adjourned to a place called the Fireplace Bar ('bar'). After a while, all of them left leaving SP14 and the deceased at the bar. On 27 January 2012 at around 3am, SP14 and the deceased left together from the bar. Outside the bar, a quarrel ensued between the deceased and a group E of men in a Proton Satria ('the said car'). As a result, SP14 requested SP10 to come to the scene. When SP14 and SP10 were in their car, SP14 purportedly saw the accused persons running towards the deceased and 'punching' the deceased. Then, SP14 saw the first accused run past their car and also saw a knife on the road beside their car. At the material time, SP10 F purportedly saw the person who punched the deceased drop a knife at a distance of two to three meters from their car. SP15 further alleged that upon arriving at the scene, he saw the second accused punching the deceased through the rear view mirror of his car. Two policemen, namely, SP8 and SP16 while attempting to detain the driver of the said car, observed that the driver was the first accused while the passenger was the second accused. The G accused persons were then arrested and charged together under s. 302 of the Penal Code. SP10, SP14, SP15, SP8 and SP16 later identified both accused persons at an identification parade and also in court. SP8 and SP16 testified that they could identify the accused persons as they were in close proximity and because there were street lights nearby. The incident took place on H 27 January 2012 while the identification parades took place on 19 March 2012 and 21 March 2012 respectively. It was the defence of the accused persons that the identification by SP10, SP14, SP15, SP8 and SP16 were mistaken. The issue that arose for determination, amongst others, were (i) whether the identification evidence was of good quality, taking into I account the circumstances in which the identification by the witness was made; (ii) whether was there any other evidence which supported the correctness of the identification; and (iii) whether there were any infirmities in the conduct of these parades.

Held (acquitting both accused persons):

(1) If the judge was unable to find other supporting evidence for the identification evidence, the judge should then be mindful that a conviction which relied on such poor identification evidence would be unsafe ('*Turnbull* guidelines'). On the facts, the case against the accused depended wholly or substantially on the correctness of the identification evidence which was alleged by the defence to be mistaken. (paras 19-22)

(2) None of the accused persons were known to any of the prosecution witnesses prior to the incident. Therefore, it was necessary for the witnesses to have given a description of the accused. A perusal of the evidence of SP8, SP10, SP14, SP15 and SP16 indicated that none of them had given any description of the accused persons. (paras 33 & 34)

(3) SP14 testified on the first day of giving her evidence that she only managed to identify the accused from their body physique. However, the next day of giving evidence SP14 then said, *albeit* after some hesitation, that she could remember their faces. In light of this, SP14 evidence had to be treated with some degree of caution. Further, SP14 was hysterical and screaming at the time she witnessed the attack upon the deceased. Therefore, her ability to identify the accused under such emotionally charged conditions must be considered carefully. Also, SP14 admitted to consuming alcohol that night at the bar. It was not inconceivable that this may have impaired her ability to observe events accurately. (paras 38 & 39)

(4) SP8, SP10, SP14 and SP15 testified that their observation of the incident upon the deceased happened very quickly. Therefore, it was not inaccurate under the circumstances to describe the length of time these witnesses took to observe the events that occurred as being no more than that of a fleeting glance. It was obvious that the extremely brief period of time and limited opportunity for each witness to identify the accused would have a profound bearing on the quality of identification. (paras 43-47)

(5) In view of the less than satisfactory lighting conditions and the contradiction between SP10 and SP14 in respect of the position of the deceased at the time of the attack, it could be said that the opportunity for unimpeded observation on the part of SP14 and SP15 was minimal at best. (para 58)

(6) None of the witnesses were able to give any description of any distinguishing or outstanding features of any of the accused persons. Apart from general observation regarding the accused persons, not one of the witnesses were able to descend into specifics of the accused persons. Therefore, there was no form of special or distinguishing features of both accused persons given so as to enable any of the witnesses to remember them. (paras 59 & 61)

(7) In light of the failure of the witnesses to give any form of initial description of the assailant soon after the incident, the lapse of time between the original identification and the identification parade would in the ordinary course of human nature lessen the ability of these witnesses to identify the assailants at the identification parade with any accuracy or certainty. Thus, the identification evidence was not of good quality, taking into account the circumstances in which the identification by the witness was made. (paras 63 & 64)

(8) All the witnesses were kept in the same holding room during the identification parade in respect of the second accused, and at the conclusion of the identification each witness had returned to the holding room. This opened the possibility of the opportunity of the witnesses to have not only discussed the case before each identification but also upon each witness returning to the holding room, to have informed the other witnesses of the position of the suspects in the line-up, given the fact that they remained in their position unchanged throughout the exercise. (para 81)

(9) Although both accused persons were placed in both the line-ups for the identification parades conducted on 19 March 2012 and 21 March 2012 respectively, the witnesses only identified one accused at each parade. No explanation was forthcoming by the prosecution for this anomaly. There was yet another flaw in respect of the conduct of the identification parade. Eleven participants were involved on top of which the recommended ratio was not followed as both accused persons were present in both parades. This would be a situation which was less than fair and prejudicial to the accused persons. (paras 82-84)

(10) There was also evidence from SP8 that he was asked by the officer conducting the parade to identify the person who was the driver of the said car in the first identification parade. In the second parade, SP8 was asked to identify the one who ran across. It was obvious that the idea here was to avoid giving too specific directions to the witness and especially to give the impression that the perpetrator was definitely present in the line-up as that might unduly influence the witnesses in making the identification to the prejudice of the suspects. (paras 85 & 86)

(11) The participants in the identification parade line-up should be of the same nationality as the suspect. Although P11 and P24 did not show the presence of any other race other than Indians in the line-up, the evidence of SP8, SP10 and SP15 suggested that there were Malay participants included in the line-up. Further, SP9 who was involved in the conduct of one of the identification parades was also involved in part of the investigations. The involvement of SP9 in the conduct of the identification parade under the circumstances could not therefore be described as unbiased. SP9's involvement was also prejudicial to the

accused persons. It was evident from the foregoing, the conduct of the identification parades suffered from infirmities that do not assist the prosecution in proving positively, the identification of the accused persons. Similarly, the dock identification of both the accused persons in this case was therefore rendered of little value or significance. (paras 87-90, 92 & 94)

(12) Although blood samples were found and taken from the said car, no results were forthcoming as it showed a negative result as evident from the chemist report. No link to the accused persons could therefore be made in this regard. No fingerprints of the accused persons were also found on the knife. There was no other evidence which supported the correctness of the identification. (paras 101 & 102)

(13) The evidence of three witnesses, namely, SP10, SP14 and SP15 was that they witnessed the deceased being 'punched'. Further, SP14 testified that she did not see the assailants use any weapon when 'punching' the deceased. Given that the pathologist had testified to the presence of extensive slash wounds, the evidence of these three witnesses raised some doubts as to how and at whose hands the deceased sustained those injuries. (para 106)

(14) Since there was no other supporting evidence for the identification evidence, a conviction which relied on such poor identification evidence would be unsafe. Coupled with the contradictions in the testimony of the witnesses alluded to and upon conducting a maximum evaluation of the evidence, the prosecution had failed to prove the identity of both the accused persons. The prosecution had therefore failed to prove that it was the accused persons who had caused the death of the deceased and therefore failed to prove a *prima facie* case against both accused persons under s. 302 of the Penal Code. (paras 107 & 108)

Case(s) referred to:

Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***
Balwant Singh v. PP [1960] 1 LNS 10 HC ***(refd)***
Chan Sin v. PP [1949] 1 LNS 9 HC ***(refd)***
Duis Akim & Ors v. PP [2013] 9 CLJ 692 FC ***(refd)***
Erivesto Anderson & Anor v. PP [2008] 6 CLJ 453 FC ***(refd)***
Heng Aik Ren Thomas v. PP [1998] 3 SLR 465 CA ***(refd)***
Jaafar Ali v. PP [1999] 1 CLJ 410 HC ***(refd)***
Lim Guan Eng v. PP & Other Appeals [1998] 3 CLJ 769 CA ***(refd)***
Looi Kow Chai & Anor v. PP [2003] 1 CLJ 734 CA ***(refd)***
Mohamad Yazri Minhat v. PP [2003] 2 CLJ 65 CA ***(refd)***
Mohammed Rafi v. PP & Other Appeals [2015] 4 CLJ 446 CA ***(refd)***
PP v. Chan Choon Keong & Ors [1989] 2 CLJ 216; [1989] 2 CLJ (Rep) 300 HC ***(refd)***
PP v. Dato' Seri Anwar Ibrahim (No 3) [1999] 2 CLJ 215 HC ***(refd)***
PP v. Khamis Keli (M) & Ors [2014] 1 LNS 1328 HC ***(refd)***
PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC ***(refd)***
R v. Turnbull And Others [1976] 3 All ER 549 ***(refd)***
ST Shinde v. State of Maharashtra AIR 1974 SC 791 ***(refd)***
Yau Heng Fang v. PP [1985] 2 CLJ 22; [1985] CLJ (Rep) 350 SC ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 180(1)
Evidence Act 1950, s. 9
Penal Code, ss. 300, 302

For the 1st accused - Baldev Bhar; Syarikat Baldev Bhar
For the 2nd accused - Dev Kumaraendran; M/s Kumar & Co
For the respondent - Siti Fatimah Talib, DPP; State Legal Advisor's Office, Penang

Reported by Sandra Gabriel

JUDGMENT

Collin Lawrence Sequerah JC:

The Charge Against The Accused

[1] Both the accused abovenamed were charged as follows:

> Bahawa kamu bersama-sama pada 27.1.2012 jam lebih kurang 3.40 pagi, di kawasan parkir di hadapan Maa Roy Thai Seafood, Jalan Gerbang Kecil 2, Krystal Point, Queensbay, Bayan Baru, di dalam Daerah Barat Daya, di dalam Negeri Pulau Pinang, dalam mencapai niat bersama, kamu berdua, telah melakukan kesalahan membunuh dengan menyebabkan kematian ke atas Navintharan a/l Ramamoorthy (No KP: 880429-08-6045), dan dengan itu kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah Seksyen 302 Kanun Keseksaan di baca bersama Seksyen 34 Kanun Keseksaan.

[2] Translated into English the charge reads:

> That you together on the 27.1.2012 at around 3.40a.m, at the parking area in front of Maa Roy Thai Seafood, Jalan Gerbang Bukit Kecil 2, Krystal Point, Queensbay, Bayan Baru, in the Southwest District, in the State of Penang, did with common intention, commit the murder of Navintharan a/l Ramamoorthy (NRIC No: 880429-08-6045), and have thereby committed an offence punishable under section 302 Penal Code read together with section 34 of the Penal Code.

Prosecution Evidence

[3] On 26 January 2012 at about 7.30pm, SP10, SP14 and SP15 along with some of their family members and friends went to the Maha Curry House at Crystal Point for a meal. The deceased, Navintharan a/l Ramamoorthy, who was the boyfriend of SP14, was with them. After sometime, some of them adjourned to the Fireplace Bar ("bar") at Kristal Point, Bayan Baru, Pulau Pinang. This was around 10pm. After a while, all of them left leaving SP14 and the deceased at the bar.

[4] On 27 January 2012 at around 3am, SP14 and the deceased left together from the Fireplace Bar in order to return to their respective homes. While still outside the bar, there were a group of men in a Proton Satria car and one of them was reviving the engine of the car which resulted in a loud noise. The said deceased told the men to stop reviving the car engine and as a result a quarrel ensued which then resulted in the deceased being punched.

[5] SP14 then telephoned her sister, SP10, to come and pick her up to go home. SP10 arrived around 10 to 15 minutes later. SP14 then got into the car and SP10 then drove further down the road and made a U-turn. SP14 asked SP10 to follow the deceased's car. At the time, the deceased had yet to get into his car. SP14 then said she saw the accused persons run from the direction of the main road towards the deceased and saw them "punching" the deceased for a few seconds. SP14 then saw the second accused run towards the road while the first accused ran past her car.

[6] When SP14 alighted from her car, she saw a knife on the road beside her car. At the time, SP14 was screaming and she went towards the deceased who was bleeding. SP14 later identified both accused at an identification parade.

[7] SP10 testified that at the time of the incident, both she and SP14 were in her car and she was seated in the driver's seat with her window wound down. SP10 said that she saw the person who punched the deceased drop an object at a distance of two to three metres from her car. After she alighted from her car, she saw that the object was a knife.

[8] SP15 testified that when he arrived at the scene, he saw through the rear view mirror of his car, the second accused punching the deceased and then running past his car. SP15 later also identified the second accused at an identification parade. SP10, SP14 and SP15 also identified both the accused in court.

[9] Two policemen, namely, SP8 and SP16 who were on patrol duty also arrived at the scene. According to them, they attempted to detain the driver of a Satria car Registration No. ADW 6646 as it was posing an obstruction on the road. While SP8 attempted to detain the driver, he observed that the driver was the first accused while the passenger was the second accused. SP8 and SP16 further said that while they attempted to detain the first accused, the second accused ran into the said car after which the car sped off.

[10] SP8 and SP16 then went over to the scene of the assault and saw that the deceased was bleeding and called an ambulance which arrived sometime later and took the deceased to the hospital where he succumbed to his injuries. SP8 and SP16 said that they could identify the accused persons as they were in close proximity and because there were street lights nearby. A subsequent check by SP16 through the system at the Bilik Gerakan Barat Daya revealed that the Satria car Registration No. ADW 6646 belonged to the first accused. Both SP8 and SP16 identified both accused at the identification parade and in the dock.

Duty Of Court At The End Of Prosecution Case

[11] Section 180(1) of the Criminal Procedure Code stipulates the duty of the court at the end of the prosecution case which is when the case for the prosecution is concluded the court shall consider whether the prosecution has made out a *prima facie* case against the accused.

[12] The duty upon the court at that stage has also been the subject of judicial consideration in the cases of *PP v. Dato' Seri Anwar Ibrahim (No 3)* [1999] 2 CLJ 215; [1999] 2 AMR 2017; [1999] 2 MLJ 1, *Looi Kow Chai & Anor v. PP* [2003] 1 CLJ 734; [2003] 2 AMR 89, *Balachandran v. PP* [2005] 1 CLJ 85 and *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457; [2005] 6 AMR 203 respectively. They are all united in the stand that they take, and that is that the evidence at the close of the case for the prosecution must be subjected to maximum evaluation in order to determine whether a *prima facie* case is made out that would justify a court in calling for the defence of the accused.

[13] The phrase "*prima facie* case" itself has not been statutorily defined in the above sections. However, it has been the subject of judicial pronouncement. In the case of *Dato' Seri Anwar Ibrahim (No 3)* (*supra*), His Lordship Augustine Paul J (as he then was) had this to say on the meaning of the phrase "*prima facie* case":

> The meaning of *prima facie* case in s. 180(1) of the Criminal Procedure Code must be understood in the context of a non-jury trial. A *prima facie* case arises where the evidence in favour of a party is sufficiently strong for the opposing party to be called on to answer. The evidence adduced must be such that it can be overthrown only by rebutting evidence by the other side. *Taken in its totality, the force of the evidence must be such that, if unrebutted, it is sufficient to induce the court to believe in the existence of the facts stated in the charge or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts existed or did happen. As this exercise cannot be postponed to the end of the trial a maximum evaluation of the credibility of the witnesses must be done at the close of the case against the prosecution before the court can rule that a prima facie case has been made out in order to call for defence.* Be that as it may, I am unable to agree with the defence submission that this means that the prosecution must prove its case beyond reasonable doubt at that stage. A case is said to have been proven beyond a reasonable doubt only upon a consideration and assessment of all the evidence (see *Canadian Criminal Evidence* (3rd Ed) … **thus, a *prima facie* case as prescribed by the new s. 180(1) of the Criminal Procedure Code must mean a case which if unrebutted would warrant a conviction**.
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> (emphasis added)

[14] In *Looi Kow Chai & Anor v. PP* [2003] 1 CLJ 734; [2003] 2 MLJ 65, Gopal Sri Ram JCA (as he then was) speaking for the Court of Appeal put it in this manner:

> In our respectful view, the correct test to be applied in determining whether a *prima facie* case has been made out under s. 180 of the CPC (and this would apply to a trial under s. 173 of the CPC) is that as encapsulated in the judgment of Hashim Yeop Sani FJ (as he then was) in *Dato' Mokhtar bin Hashim & Anor v. Public Prosecutor* [1983] 2 MLJ 232 at p. 270:
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> > To summarise, it would therefore appear that having regard to the prosecution evidence adduced so far, a *prima facie* case has not been established against Nordin Johan and Aziz Abdullah, the second accused and the fourth accused which, failing their rebuttal,

> would warrant their conviction. In other words if they elect to remain silent now (which I hold they are perfectly entitled to do even though they are being tried under the Emergency Regulations) the question is can they be convicted of the offence of section 302 read with section 34 of the Penal Code? My answer to the question is in the negative.
>
> We are confident in the view we have just expressed because we find nothing in the amended s. 180(1) of the CPC that has taken away the right of an accused person to remain silent at the close of the prosecution case. Further, we find nothing in the legislative intention of Parliament as expressed in the language employed by it to show that there should be a dual exercise by a judge under s. 180 when an accused elects to remain silent as happened in *Pavone v. Public Prosecutor* [1984] 1 MLJ 77. *In other words, we are unable to discover anything in the language of the recently formulated s. 180 that requires a judge sitting alone first to make a minimum evaluation and then when the accused elects to remain silent to make a maximum evaluation in deciding whether to convict or not at the close of the prosecution case.*
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> *It therefore follows that there is only one exercise that a judge sitting alone under s. 180 of the CPC has to undertake at the close of the prosecution case. He must subject the prosecution evidence to maximum evaluation and to ask himself the question: if I decide to call upon the accused to enter his defence and he elects to remain silent, am I prepared to convict him on the totality of the evidence contained in the prosecution case? If the answer is in the negative then no prima facie case has been made out and the accused would be entitled to an acquittal.*
>
> (emphasis added)

[15] It is therefore evident that the expected standard to which a trial court should hold the prosecution to is that of a maximum evaluation of the evidence of all their witnesses. This exercise necessarily involves the court in subjecting all the evidence of the prosecution witnesses to strict curial scrutiny. The credibility of the testimony of all the witnesses for the prosecution must be scrutinised and evaluated with a fine toothcomb. Should more than one inference arise as a result of this exercise, the one favourable to the accused must be adopted. The analysis of the evidence led by the prosecution proceeded in accordance with the foregoing principles.

Analysis Of The Prosecution Case

[16] In order for the prosecution to make out a *prima facie* case against the accused in a charge under s. 302 of the Penal Code, they have to prove the following ingredients namely:

(a) the death of Navintharan a/l Ramamoorthy (NRIC No. 880429-08-6045), deceased;

(b) that the death of the said deceased was as a result of the injuries sustained by him and fell within one or more of the limbs enumerated in s. 300 of the Penal Code; and

(c) that it was the accused persons who caused the death of the deceased.

[17] SP19, the pathologist, testified as to the nature of the injuries sustained by the deceased and concluded that Injury No. 3 in the post-mortem report (exh. P48) was the fatal injury. SP19 further testified that the knife (P27A) could have been the weapon to inflict such injury. The evidence of SP19 constitutes sufficient evidence in order to prove the death of the deceased and that the death was as a result of the injuries sustained by the deceased. I am satisfied that based upon the available evidence the prosecution has succeeded in proving ingredient in (a) and (b) above.

[18] The third ingredient or ingredient in (c) above that the prosecution must prove is that it was the accused persons who caused the death of the deceased. It is clear given the line of cross-examination taken by the defence that the identification of the accused persons by SP8, SP10, SP14, SP15 and SP16 are alleged to be mistaken.

[19] It is not in dispute therefore that from the nature of the evidence adduced, this case is one that depends wholly or substantially upon the correctness of the identification of the accused persons which the defence here has alleged to be mistaken. This brings into sharp focus the application of the *Turnbull* guidelines.

[20] The *Turnbull* guidelines have been reworked and distilled into a three-step test. The first question which a judge should ask where there is identification evidence is whether the case against the accused depends wholly or substantially on the correctness of the identification evidence which is alleged by the defence to be mistaken.

[21] If so, the second question is whether the identification evidence is of good quality, taking into account the circumstances in which the identification by the witness was made. Where the quality of the identification evidence is poor, the judge should go on to ask the third question ie, whether is there any other evidence which goes to support the correctness of the identification.

[22] If the judge is unable to find other supporting evidence for the identification evidence, he should be mindful that a conviction which relies on such poor identification evidence would be unsafe. See *PP v. Khamis Keli (M) & Ors* [2014] 1 LNS 1328; [2015] 10 MLJ 810.

[23] The principles enunciated in the case of *R v. Turnbull And Others* [1976] 3 All ER 549 which have over time come to be known as the '*Turnbull* guidelines' have been systematically and consistently followed by the courts in this country for the longest time. Although decided almost some four decades ago, they remain relevant in cases which depend wholly or substantially on identification evidence. To accord it the recognition it deserves, the guidelines in *Turnbull* merit repetition in their entirety and are as follows:

First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition, he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms the judge need not use any particular form of words.

Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? If in any case, whether it is being dealt with summarily or on indictment, the prosecution have reason to believe that there is such a material discrepancy they should supply the accused or his legal advisers with particulars of the description the police were first given. In all cases if the accused asks to be given particulars of such descriptions, the prosecution should supply them. **Finally, he should remind the jury of any specific weaknesses which had appeared in the identification evidence**. Recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.

All these matters go to the quality of the identification evidence. If the quality is good and remains good at the close of the accused's case, the danger of a mistaken identification is lessened; but the poorer the quality, the greater the danger. In our judgment, when the quality is good, as for example when the identification is made after a long period of observation, or in satisfactory conditions by a relative, a neighbour, a close friend, a workmate and the like, the jury can safely be left to assess the value of the identifying evidence even though there is no other evidence to support it; provided always, however, that an adequate warning has been given about the special need for caution. Were the courts to adjudge otherwise, affronts to justice would frequently occur.

(emphasis added)

[24] Their Lordships of the Court of Appeal in England in *Turnbull* went on to say:

A failure to follow these guidelines is likely to result in a conviction being quashed and will do so if in the judgment of this court on all the evidence the verdict is either unsatisfactory or unsafe.

[25] These guidelines were comprehensively considered and adopted in the High Court decision of *Jaafar Ali v. PP* [1999] 1 CLJ 410; [1998] 4 MLJ 406 which repeated them *in extenso*.

[26] The *Turnbull* guidelines were of course made in the context of a jury trial. Jury trials have since been abolished in this jurisdiction but the duty to warn as to the dangers as prescribed above still remains and it now falls upon a trial judge sitting alone to administer the warning of the dangers involved to itself.

[27] As stated earlier, the *Turnbull* guidelines were reformulated into a three-step test by the Singapore Court of Appeal in the case of *Heng Aik Ren Thomas v. PP* [1998] 3 SLR 465 and referred to recently by our Federal Court in the case of *Duis Akim & Ors v. PP* [2013] 9 CLJ 692; [2014] 1 MLJ 49 in a passage that bears useful reproduction:

> To begin it is in the forefront of our minds the *Turnbull* guidelines (*R v. Turnbull And Others* [1976] 3 All ER 549) as succinctly summarised in the case of *Heng Aik Ren Thomas v. Public Prosecutor* [1998] 3 SLR(R) 142. Delivering judgment for the Singapore Court of Appeal M Karthigesu JA said this at paras. 33-35 of the judgment:
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> > Although the *Turnbull* guidelines were drafted to assist a trial judge in correctly directing the jury, the principles which were enunciated in it are of equal relevance to our criminal trial system. In adapting the *Turnbull* guidelines for our local system, we have reworked the *Turnbull* guidelines into the following three-step test. *The first question which a judge should ask when encountering a criminal case where there is identification evidence, is whether the case against the accused depends wholly or substantially on the correctness of the identification evidence which is alleged by the defence to be mistaken.*
> >
> > *If so, the second question should be this. Is the identification evidence of good quality, taking into account the circumstances in which the identification by the witness was made?* A non-exhaustive list of factors which could be considered include the length of time that the witness observed the accused, the distance at which the observation was made, the presence of obstructions in the way of the observation, the number of times the witness had seen the accused, the frequency with which the witness saw the accused, the presence of any special reasons for the witness to remember the accused, the length of time which had elapsed between the original observation and the subsequent identification to the police and the presence of material discrepancies between the description of the accused as given by the witness and the actual appearance of the accused. In considering the circumstances in which the identification was made, the judge should take note of any specific weaknesses in the identification evidence. *If after evaluation of the identification evidence, the judge is satisfied that the quality of the identification is good, he may then go on to safely assess the value of the identification evidence. Where the quality of the identification evidence is poor, the judge should go on to ask the third question. Is there in any other evidence which goes to support the correctness*

> *of the identification. If the judge is unable to find other supporting evidence for the identification evidence, he should then be mindful that a conviction which relies on such poor identification evidence would be unsafe.* The supporting evidence need not be corroboration evidence of the kind required in *R v. Baskerville* [1916] 2 KB 658. What the supporting evidence has to be is evidence that makes the judge sure that there was no mistake in the identification.
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> We agree with the summary of the guidelines.
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> (emphasis added)

[28] In *Yau Heng Fang v. PP* [1985] 2 CLJ 22; [1985] CLJ (Rep) 350; [1985] 2 MLJ 335 it was held:

> If the prosecution depends solely, as in the present case, upon visual identification by one or more witnesses, the Judge must withdraw the case from the jury if the evidence is of poor quality (see *R v. Turnbull* [1976] 3 All ER 549, 553). In our opinion, both from the poor opportunity for the eye-witnesses to recognise the appellant and their poor quality as identity witnesses, their testimony on the issue of identity must be held to be inherently incredible. In the absence of evidence to connect the appellant with the crime, which is an essential element in any criminal prosecution, no *prima facie* case could have been established by the prosecution and the appellant should therefore have been acquitted without his defence being called.

[29] This court is also acutely aware of the observations made in the case of *Mohamad Yazri Minhat v. PP* [2003] 2 CLJ 65; [2003] 2 MLJ 241 where the Court of Appeal held at p. 245:

> Now, the English case of *Turnbull* did not lay down any proposition of law embodied in concrete. As all members of the criminal bar are aware, the several propositions in *Turnbull* are known as the '*Turnbull* guidelines'. And that is what they really are. They are just guidelines and each case depends on its own facts. What was said in *Turnbull* does not amount to inflexible rules with no exceptions whatsoever.

[30] Similar sentiments were also expressed by the Federal Court in the case of *Erivesto Anderson & Anor v. PP* [2008] 6 CLJ 453; [2009] 1 MLJ 593. Although expressed to be guidelines and no more, these views were made in the context of an assault launched upon the failure of the trial judge in that case to expressly make reference to the *Turnbull* guidelines. The learned judge had nevertheless duly proceeded to consider the quality of identification evidence and the circumstances in which they were made. Despite this, it is not in dispute that a conviction premised upon a failure to adhere to the guidelines in circumstances which warrant their application is liable to be quashed on appeal.

[31] As earlier alluded to and to recapitulate, the case against the accused depends wholly or substantially on the correctness of the identification

A evidence which is alleged by the defence to be mistaken. The first of the questions raised in the reformulated version of the *Turnbull* guidelines has therefore been answered in the positive.

[32] The process the court has to undertake now is to apply each of the guidelines set out in *Turnbull* insofar as they are relevant to the facts in the
B instant case in order to assess the nature and quality of the identification evidence adduced by the prosecution. This exercise is also necessary in order to answer the second question which is whether the identification evidence is of good quality, taking into account the circumstances in which the identification by the witnesses was made.

C

Description By The Witnesses Of The Accused Persons

[33] It is not in dispute that none of the accused persons were known to any of the prosecution witnesses prior to the incident. That being the case, it was necessary for the witnesses to have given a description of the accused.
D See *Jaafar Ali v. PP* [1999] 1 CLJ 410; [1998] 4 MLJ 417.

[34] A perusal of the evidence of SP8, SP10, SP14, SP15 and SP16 would indicate that none of them had given any description of the accused persons of any sort. None of them except for SP8 had lodged a report and even then there was no description of any of the accused in the report.

E

[35] SP8 testified that the male Indian that he saw running from the Fire Place Bar was big and tall but he did not see his face. However, he managed to identify the second accused at an identification parade held on 21 March 2012 based on his physique which he said was big and tough. SP8 agreed however with the suggestion of learned counsel that the appearance of the
F second accused in the dock by comparison was thin.

[36] SP10 testified that she saw one person run across the front of her car. She said then that after this person attacked the deceased, he ran behind her car. She described this person as skinny and tall. She also identified both the accused persons based on body physique because she did not see their faces.

G

[37] SP14 on the other hand, testified that she saw two men attacking the deceased one of which she described as being of small size. This person she identified as the first accused. The other person being the second accused she described as being tougher. She also said that one of them had facial hair but
H she could not remember whom.

[38] The other crucial aspect to note about the evidence of SP14 is that despite the fact that she testified on the first day of giving her evidence that she only managed to identify the accused from their body physique, on the next day of giving evidence she then said, *albeit* after some hesitation, that
I she could remember their faces. In the light of this, her evidence has to be treated with some degree of caution.

[39] It is also relevant to consider that SP10 testified that SP14 at the time she said she witnessed the attack upon the deceased was hysterical and screaming. This of course, was not unusual as she was the deceased's girlfriend. Her ability to identify the accused under such emotionally charged conditions must be considered carefully. It must also be remembered that SP14 had admitted to consuming alcohol that night at the bar and it is not inconceivable that this may have impaired her ability to observe events accurately.

[40] SP15, the brother of SP10 and SP14, testified that he could not see through his rear view mirror who the two assailants were who were assaulting the deceased but saw only one person running pass his car. This person he identified by his face, hair and body. However, no description of these features were given. He was able to however identify the second accused at the identification parade.

[41] SP16 testified that he saw a man running from the Fire Place Bar to the car whom he described as a male Indian who was fat and dark. He recognised this person as the second accused based upon his body physique, face and skin tone. However, he was unable to give any description of his facial features.

[42] It is evident that none of these witnesses gave any sort of description of either of the accused persons to the police.

How Long Did The Witnesses Have The Accused Persons Under Their Observation?

[43] SP8 testified that the time from which he first observed the driver waiting in the car to him witnessing the other male Indian running into the car and the car driving off took around five seconds.

[44] SP10 said that her observation of the man running across her car and attack the deceased before running off again happened too fast and she was unable to tell how long this took.

[45] SP14 said that her observation of the attack upon the deceased lasted hardly ten seconds.

[46] SP15 had agreed during the course of cross-examination that the "punching" incident upon the deceased happened very quickly.

[47] It is not altogether inaccurate under the circumstances to describe the length of time these witnesses took to observe the events that occurred as being no more than that of a fleeting glance. It is obvious that the extremely brief period of time and limited opportunity for each witness to identify the accused would have a profound bearing on the quality of identification.

At What Distance And In What Light Was The Observation Made And Was The Observation Impeded In Any Way?

[48] The incident here happened at around 3.40am. The scene of the incident was also a slip road in front of the Fire Place Bar at Kristal Point at Bayan Baru.

[49] SP8 testified that at the time of the incident the area was dark and the only lighting was from the main road and this was situated around 30 feet away. SP8 also agreed that from the photograph (exh. P4), the lighting seen was from the flash of the camera.

[50] SP10 said that at the time around 3am, the shops along Kristal Point was dark as all the shops were closed. She further added that the five foot way in front of the shop was also not lighted and she said that the only light there was, emanated from the street lights at the main road.

[51] SP14 testified that there were no lights on the slip road in front of Kristal Point but did say that the only lights were from the shops that were still open or about to close. She also agreed that from the photograph (P4) the surrounding area at the scene was dark.

[52] SP15 said that there were lights from the main road but that the slip road in front of Kristal Point had no lights. He confirmed during cross-examination that the scene of the incident had no street lighting and that the slip road in front of the Fire Place Bar was dark.

[53] Although SP14 said that there were lights from shops, this evidence contradicts that of SP10 and SP15 who had clearly said that the area of the scene was dark. From a totality of the evidence of the witnesses present at the scene, it can be safely concluded that the surrounding conditions at the scene during the incident was not well lit.

[54] In respect of whether there were any impediments to the observation of the witnesses, SP10 had contradicted her sister SP14. SP10 testified that after she made the U-turn with her car and returned to check on the deceased, her car was situated parallel or slightly ahead of the deceased's car. SP10 said that during the attack, the deceased was situated more to the right side and to the middle of her car.

[55] At that time, SP10 said that SP14 was seated in the passenger seat. However, when SP14 was cross-examined she said that the deceased was in front and not at the side of SP10's car. If this was indeed the case then SP14's observation of the incident would have been unobstructed.

[56] However, if one were to accept SP10's version, then it would mean that SP14's view of the assault would have been impeded by her sister, SP10, seated at the driver's seat. Given the fact that the surrounding area was not well lit and the fact that SP14 had agreed that she was screaming and hysterical at the time, the circumstances did not support evidence of unimpeded observation of the events that took place.

[57] SP15 was only able to observe the assault on the deceased through the very narrow confines of his rear view mirror and as evident from his testimony, was unable to get a clear view of the assailants.

[58] On the whole, it is evident that in view of the less than satisfactory lighting conditions and the contradiction between SP10 and SP14 in respect of the position of the deceased at the time of the attack, it can be said that the opportunity for unimpeded observation on the part of SP14 and SP15 was minimal at best.

Was There Any Special Reason For The Witnesses To Remember The Accused Persons?

[59] As is evident from the testimony of the witnesses, none of them were able to give any description of any distinguishing or outstanding features of any of the accused persons. Apart from general observation regarding their body physique, not one of the witnesses were able to descend into specifics for example, whether any of the accused had a scar or a certain hairstyle or had a moustache or beard fashioned in a certain way.

[60] The only description of any sort was in relation to one of the men that night having worn a grey T-shirt. It also bears recollection that none of the witnesses had given any sort of description of the assailants either in the form of a police report or in their statements.

[61] It is therefore evident that there was no form of special or distinguishing features of both accused persons given so as to enable any of the witnesses to remember them.

How Long Elapsed Between The Original Observation And The Subsequent Identification To The Police?

[62] The incident which resulted in the untimely demise of the deceased took place on 27 January 2012 while the identification parades took place on the 19 March 2012 and 21 March 2012 respectively. This is a period of approximately under two months.

[63] In the light of the failure of the witnesses to give any form of initial description of the assailants to the police soon after the incident, the lapse of time between the original identification and the identification parade would in the ordinary course of human nature lessen the ability of these witnesses to identify the assailants at the identification parade with any accuracy or certainty.

[64] Given the assessment of the evidence undertaken, it is evident that the answer to the second question posed which is whether the identification evidence is of good quality, taking into account the circumstances in which the identification by the witnesses were made, has to be answered in the negative.

[65] This brings me to the third question which is where the quality of the identification evidence is poor, the judge should go on to ask whether is there any other evidence which goes to support the correctness of the identification. These will now be considered.

A *Material Contradictions Between The Witnesses. How Many Assailants Were There?*

[66] There appears to be what can only be described as a material contradiction between the witnesses who were present with regard to the number of possible assailants at or around the scene of the incident.

B

[67] While SP10 had said that when she was seated in her car with her sister, SP14, she witnessed one male person running across the front of her car and attack the deceased with a series of punching motions and then run past the back of her car towards the main road. SP14, on the other hand, said she saw two men run towards the deceased from the main road before attacking him and thereafter one ran towards the main road while the other towards a car. These contradictions assume some degree of significance bearing in mind that both of them were seated in the same car at the same time and supposedly observing the same incident.

C

D **[68]** SP15 testified that he saw two people through his rear view mirror attacking the deceased and only one person running past his car towards the entrance to the slip road into Kristal Point.

[69] Aside from the contradiction between SP10, on the one hand and SP14 and SP15, on the other, as to the number of persons who attacked the

E deceased and subsequently run away, there is also a contradiction between SP10 and SP14 as against the evidence of SP15 as to the direction in which the men ran to.

[70] If SP15's evidence is to be believed this would mean that the Proton Satria was parked at the entrance of the slip road to Kristal Point and not at

F the main road as claimed by the other two witnesses. This contradiction more importantly could give rise to the possibility that there were two cars with one waiting at the main road and the other at the entrance to Kristal Point, a possibility that was not ruled out by SP15 when questioned.

G **[71]** Although SP15 was categorical that he was present at the scene when the attack on the deceased took place, both his sisters, SP10 and SP14 never mentioned their brother being at the scene. SP10 in fact said that he only arrived on the scene after the assault took place.

[72] While SP8 testified that SP16 did not speak at all to the driver of the

H Satria car, SP16 said that he did speak to the driver and told him to stop the car but in vain.

[73] These contradictions have to be evaluated and considered carefully as they are highly relevant in establishing the identity of the assailants that morning.

I

The Presence Of Several Other Men At The Scene

[74] The evidence of the witnesses further gave rise to the possibility of more than two persons being present at the scene at the time of the incident. SP10 testified that while she was in her car and just prior to her coming to a stop in front of the Fire Place Bar, she saw the deceased speaking with a male Indian at a stop "Berhenti" sign located on the main road. Her sister, SP14, made no mention of this male Indian.

[75] SP15 testified that as he was approaching the Fire Place Bar and was about to make a U-turn, he saw two men on a motorcycle talking to the deceased. SP10 and SP14, however, who had arrived much earlier at the scene made no mention of these two men on the motorcycle talking to the deceased.

[76] SP14 further, testified that when she left the Fire Place Bar with the deceased there occurred an argument followed by a fight between the deceased and five male Indians during which two out of the five men held the deceased on the ground while one of the men was sitting on the deceased and punching him.

[77] This incident occurred before the deceased was fatally attacked yet there is no further account from any of the prosecution witnesses as to what happened to these men after that. SP18 confirmed that apart from two men who attacked the deceased he was never informed during the course of his investigations about the existence of these five men and consequently no investigations were commenced in that regard.

Infirmities In The Identification Parades

[78] There were two identification parades conducted by the police on 19 March 2012 and 21 March 2012 respectively. A perusal of the evidence would reveal several infirmities in the conduct of these parades.

[79] The identification parade conducted by SP5 in respect of the first accused on 19 March 2012 revealed that there were 11 participants in the parade line up and none of them had changed their positions although five witnesses were involved in the identification.

[80] According to SP9 who was the officer who conducted the identification parade in respect of the second accused on 21 March 2012, there were 11 participants in the parade line up and none of them had changed their positions although eight witnesses were involved in the identification.

[81] To compound the situation, SP9 testified during cross-examination that all the eight witnesses were kept in the same holding room during the identification parade in respect of the second accused, and at the conclusion of the identification each witness had returned to the holding room. This leaves open the possibility of the opportunity of the witnesses to have not

only discussed the case before each identification but also upon each witness returning to the holding room, to have informed the other witnesses of the position of the suspects in the line-up, given the fact that they remained in their position unchanged throughout the exercise.

[82] A perusal of exhs. P11 and P24 which are the identification parade reports, indicated that although both accused were placed in both the line-ups for the identification parades conducted on 19 March 2012 and 21 March 2012 respectively, curiously, the witnesses only identified one accused at each parade.

[83] Only the first accused was identified on the 19 March 2012 while the second accused was identified on 21 March 2012 even though both were present in the line-ups on these dates. This begs the question, that if the witnesses saw both the accused at the scene at the time of the incident, why were they unable to identify both accused who were present at each of the line-ups? No explanation was forthcoming by the prosecution for this anomaly.

[84] Exhibits P11 and P24 also raises the question of why two suspects were placed in the same identification parade? Upon the authority of *PP v. Chan Choon Keong & Ors* [1989] 2 CLJ 216; [1989] 2 CLJ (Rep) 300; [1989] 2 MLJ 427, the proper way was to put up each suspect separately for identification purpose with not less than nine or ten persons. This application of this principle means there is yet another flaw in respect of the conduct of the identification parade and this is that 11 participants were involved on top of which the recommended ratio was not followed as both accused were present in both parades. This would be a situation which is less than fair and even prejudicial to the accused as the odds of positive identification would then be very much improved on the part of the witnesses.

[85] There was also evidence from SP8 that he was asked by the officer conducting the parade to identify the person who was the driver of the Satria car that night in the first identification parade and in the second parade he was asked to identify the one who ran across. SP16 was asked by the officer conducting the parade to identify the driver of the Satria car. In the case of *Balwant Singh v. PP* [1960] 1 LNS 10; [1960] 1 MLJ 264 it was held:

> The complainant was told - and quite wrongly told - by the Police Officer that there were 56 persons on the parade and the person who had raped her, and she was invited by the Police Officer to inspect the persons on the parade and point out the person who had raped her. Quite clearly that was a wholly improper direction by the Police Officer. At most he should, of course, have indicated to her that there might be present on the parade the person whom she alleged to have raped her.

[86] It is quite obvious that the idea here is to avoid giving too specific directions to the witness and especially to give the impression that the perpetrator is definitely present in the line-up as that might unduly influence the witnesses in making the identification to the prejudice of the suspects.

[87] Although P11 and P24 does not show the presence of any other race other than Indians in the line-up, the evidence of SP8, SP10 and SP15 suggested that there were Malay participants include in the line-up. In fact, SP8 had never denied the presence of Malays in the line-up. The case of *Chan Sin v. PP* [1949] 1 LNS 9; [1949] 1 MLJ 106, held that the accepted practice has always been that the participants in the identification parade line-up should be of the same nationality as the suspect.

[88] One of the officers who was involved in the conduct of one of the identification parades, namely, SP9, was also involved in part of the investigations. SP9 admitted that he was present at the scene of the crime in order to receive case exhibits from the forensic officer. This was also confirmed by the investigating officer, Inspector Jalal.

[89] To further compound the situation for the prosecution, SP8 testified that he was instructed by SP9 that it was unnecessary for him to include the registration number of the grey coloured Satria car in his police report. SP9 had further on 21 March 2015 conducted an identification of the said car where eight witnesses were asked to identify the said car.

[90] The involvement of SP9 in the conduct of the identification parade under the circumstances cannot therefore be described as unbiased. His involvement is also possibly even prejudicial to the accused. This further adds to the list of infirmities and irregularities in the identification parades conducted by the police.

[91] I am acutely aware that evidence of identification by way of identification parade is corroborative evidence and even the absence of holding an identification parade in certain cases may not prejudice the prosecution case. See the case of *ST Shinde v. State of Maharashtra* AIR 1974 SC 791 which held that while the evidence of test identification is admissible under s. 9 of the Evidence Act 1950, it is, at best, supporting evidence and can only be used to corroborate the substantive evidence given by the witnesses in court. It was further held that the earlier identification made by the witnesses at the test identification parade, by itself has no independent value.

[92] However, where the quality of the identification by the witnesses is unsatisfactory, reliance upon the identification parade assumes importance if identification is to be successfully and positively proven. As is evident however from the foregoing, the conduct of the identification parades suffers from infirmities that do not assist the prosecution in proving positively, the identification of the accused persons.

[93] Furthermore, in the recent Court of Appeal case of *Mohammed Rafi v. PP & Other Appeals* [2015] 4 CLJ 446 Balia Yusof Wahi JCA (as he then was) held as follows:

> [41] The only additional issue raised by learned counsel for the third appellant is on the identification parade held in respect of the third appellant. There were two identification parades held. According to

learned counsel, the identification parades were held about a year or a year and half after the incident. Learned counsel further submitted, as evident from the testimony of SP10 during cross-examination, the participants in the identification parade were of various make up. Some were tall, while others were short and there were also others with moustache and beard. The third appellant was on a wheelchair. He was identified by SP10 as the person who fired the shot. He was identified at the second identification parade. It was submitted that the identification parade was not proper, irregular and unfair to the third appellant. It was a bad identification.

[42] In his submission in reply, the learned Deputy Public Prosecutor submitted that even if the identification parade was defective and improperly held, there was dock identification of the third appellant by SP10. The case of *Ong Poh Cheng v. PP* [1998] 4 CLJ 1; [1998] 4 MLJ 8 was cited in support of this submission.

[43] In *PP v. Pasupathy Kanagasaby* [2001] 2 CLJ 753; [2001] 2 MLJ 143, this court had held that to ensure that the parade is properly and fairly held, it is the duty of the officer conducting the parade to look for participants who are of similar age, stature and appearance as the accused person.

[44] *In our view, the identification parade was improperly held and unfair to the third appellant. In Goh Kooi Pheng v. PP [2013] 1 CLJ 190, (Criminal Appeal No: P-05-135- 2010) this court had said; when the manner of the identification parade held was unfair to the accused, the subsequent identification in court was of little value or significance as was earlier held in Public Prosecutor v. Mohamed Majid [1976] 1 LNS 104; [1977] 1 MLJ 121. Likewise, in the instant case, having considered the factual matrix of the matter on the aspect of identification, we find that the court identification of the third appellant by SP10 is of little value or significance. The identification of the appellant is an essential part of the prosecution's case which needs to be proven satisfactorily.*

(emphasis added)

[94] Similarly, the dock identification of both the accused in this case is therefore rendered of little value or significance.

Identification Of The Proton Satria Registration No. ADW 6646

[95] Although none of the witnesses lodged any report in respect of the said car and gave its registration number, they were able to identify the car as being there the morning of the incident. Even SP8 who did lodge a report about the incident did not make mention of the car number although he said that he was instructed not to state the car registration number in the report.

[96] In the light of this, the evidence regarding the identification of the said car as being the one present there at the time of the incident must necessarily be received with caution. Given the course of events that took place at the time of the incident including the fact that the lighting conditions

were not exactly favourable, that the events took place swiftly, and the fact that the car registration number was not stated anywhere by any of the witnesses before the identification of the same which took place on 21 March 2012, some two months after the incident, it is highly unlikely that the witnesses were able to positively identify the said car as being the one present during the time of the incident if they were unaided.

[97] In any event, any doubt in this respect must be accorded to the accused persons. The description of the said car as given by the witnesses was also said to be grey in colour whereas the car bearing registration number ADW 6646 as shown in the photographs is metallic silver. The difference between grey and metallic silver is not so obvious so as to rule out the possibility of there being a mistaken identity of the car present at the time of the incident.

[98] Although the prosecution produced evidence to show that the Satria car bearing registration number ADW 6646 which was found in a workshop was registered in the name of the first accused, there was no evidence led as to how the car was brought to the workshop, who had sent the car there or why the car was in the workshop. No investigation was done in this respect. In the light of the circumstances described, this piece of evidence does not assist the prosecution in its case to prove the involvement of the accused persons at the time of the incident.

[99] Furthermore, as alluded to earlier, SP15's evidence did not altogether rule out the possibility of there having been more than one car present that morning.

[100] From a totality of the evidence adduced, it cannot be discounted the possibility of there being more than two assailants present on the morning of the incident. No explanation was forthcoming from the prosecution as to the identity and role of the five persons who had initially assaulted the deceased in front of the Fire Place Bar, the man that the deceased was seen talking to by SP10 at the stop sign on the main road, the two men on a motorcycle who were seen by SP15 talking to the deceased, and the possibility of another car being present at the scene as testified to by SP15. To put it another way, the existence of more than two assailants at the incident and the possible presence of more than one car had not been excluded, negative or discounted by the prosecution.

[101] Although blood samples were found and taken from the said car ADW 6646, no results were forthcoming as it showed a negative result as evident from the chemist report (P37). No link to the accused persons can be therefore made in this regard. No fingerprints of the accused persons were also found on the knife (P4).

[102] From a consideration of the above matters, it is clear that the answer to the third of the questions posed in the reformulated *Turnbull* test, which is whether is there any other evidence which goes to support the correctness of the identification, has also got to be answered in the negative.

[103] The infirmities described are not merely as the prosecution pointed out, a case of mere recollection of events where it cannot be expected of the witnesses that they all give identical evidence and that sometimes there are differences in versions or perspectives of the same incident.

[104] In support of this submission, the prosecution relied upon the case of *Lim Guan Eng v. PP & Other Appeals* [1998] 3 CLJ 769; [1998] 3 MLJ 14, where the principles relating to witnesses giving differing but true accounts were discussed.

[105] Were these just minor differences in account of events that occurred between witnesses who witnessed the same incident and had different perspectives of the same incident or were these serious infirmities that affected a material ingredient in the charge against the accused persons namely, their identity? To take an example, even though both SP10 and SP14 were sitting next to each other, they gave diametrically opposed testimony regarding the position of the deceased in during the attack. This is not a mere case of each witness describing the evidence from their perspective as they saw it but a serious and material contradiction in a case involving a capital offence.

[106] The evidence also raises a doubt as to how the deceased sustained the injuries which were extensive. The evidence of three witnesses, namely, SP10, SP14 and SP15 was that they witnessed the deceased being "punched". Further, SP14 testified that she did not see the assailants use any weapon when "punching" the deceased. Given that the pathologist had testified to the presence of extensive slash wounds, the evidence of these three witnesses raise some doubt as to how and at whose hands the deceased sustained those injuries. Counsel had also submitted that from the nature of the weapon produced in court and the extensive injuries sustained by the deceased, some doubt arises as to whether the knife was the weapon used or the only weapon used.

[107] The evidence regarding identification has been put through the litmus test of the *Turnbull* guidelines and I find that the prosecution evidence has failed to pass that test with flying colours, to use an intended pun. Since I am unable to find other supporting evidence for the identification evidence, it behoves me to be mindful that a conviction which relies on such poor identification evidence would be unsafe. Coupled with the contradictions in the testimony of the witnesses alluded to and upon conducting a maximum evaluation of the evidence, I find that the prosecution has failed to prove the identity of both the accused persons.

[108] The prosecution have therefore failed to prove the third ingredient, namely that it was the accused persons who had caused the death of the deceased and have therefore failed to prove a *prima facie* case against both accused under s. 302 of the Penal Code. I therefore acquit both accused of the charge against them without calling for their defence.